

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

found claimant's injuries from the December 31, 2009, accident were limited to his right shoulder. The ALJ based the award of disability benefits upon a 22% functional impairment for the right shoulder, which was an average of Dr. Daniel J. Stechschulte's 18% impairment rating and Dr. Pedro A. Murati's 26% impairment rating. The ALJ determined a preexisting impairment to the right shoulder was not established. Neither party appealed ALJ Sanders' ruling that pursuant to K.S.A. 44-512b, claimant was entitled to interest of \$1.18 per day commencing August 15, 2012, until respondent pays claimant a functional impairment award based upon a 13% functional impairment to the right shoulder.

Claimant contends he sustained injuries to his right shoulder and neck resulting in a 20% whole body functional impairment. Further, claimant contends he is entitled to benefits for an 83.34% work disability from October 7, 2011, through August 19, 2012, and a 40.16% work disability beginning August 20, 2012. Claimant maintains the ALJ's finding that respondent failed to establish claimant had a preexisting impairment to his right shoulder should be affirmed.

Respondent submits ALJ Sanders correctly found that claimant sustained a scheduled injury to his right shoulder and did not prove a whole body injury involving his neck. Respondent maintains claimant has a 4% preexisting impairment to his right shoulder. If the Board finds claimant sustained a whole body functional impairment, respondent asserts claimant has a 0% task loss and a 13.65% wage loss.

The issues before the Board on this appeal are:

1. Did claimant sustain a whole body functional impairment as the result of an alleged neck injury or is his functional impairment limited to the right upper extremity at the level of the shoulder?
2. What, if any, was claimant's preexisting functional impairment to the right upper extremity?
3. If the Board determines claimant has a whole body functional impairment, then what is claimant's functional impairment, wage loss, task loss and work disability?
4. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The ALJ's Award sets out findings of fact that are detailed and accurate. It is not necessary to repeat those findings herein. The Board adopts the ALJ's findings of fact as its own as if specifically set forth herein.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³

The crucial issue is whether claimant sustained only a right upper extremity functional impairment or also sustained a whole person functional impairment as the result of an alleged neck injury. Claimant testified that the December 31, 2009, accident caused his shoulder to pop out and he had pain in his shoulder and pain in a little bit of his neck. At the regular hearing, claimant testified he had a stiff neck and shooting pains once in a while, with tingling and numbness once a day in his right arm from his neck to his fingers. Claimant was released to full duty status on April 14, 2011, and he was terminated by respondent in October 2011 for tardiness.

After his accident on December 31, 2009, through the regular hearing on July 12, 2012, claimant never applied for a preliminary hearing requesting medical treatment for his neck. If claimant had complained of neck pain, a reasonable person would conclude that at least one of the three doctors who treated claimant would have recorded the complaints. Dr. Donald Mead examined claimant’s neck and found it nontender. Dr. Craig L. Vosburgh examined claimant’s neck and found it to be supple and testified that meant the neck could move easily and had no spasm in the neck muscle. Claimant was treated by Dr. Daniel J. Stechschulte from October 22, 2010, through April 14, 2011, when he released claimant to full duty. Dr. Stechschulte saw claimant for a follow-up visit on October 11, 2011. Yet, Dr. Stechschulte testified claimant never made neck complaints.

The first reference to a neck injury or complaint in the records of a medical provider was in Dr. Pedro A. Murati’s November 8, 2011, report. That visit was almost one month after claimant saw Dr. Stechschulte on October 11, 2011. Dr. Murati testified that he reviewed the records of Drs. Mead, Vosburgh and Stechschulte and found no mention of claimant complaining of neck symptoms. Dr. Murati testified that when he palpated claimant’s neck, claimant had a trigger point and claimant had limited left lateral flexion, which told Dr. Murati there was a problem in the cervical paraspinals. Dr. Murati’s opinion

² K.S.A. 2009 Supp. 44-501(a).

³ K.S.A. 2009 Supp. 44-508(g).

that claimant has a whole body impairment based upon myofascial pain is based upon subjective complaints made by claimant.

The Board concurs with the reasoning of ALJ Sanders when she stated in the Award:

There were four doctors who testified in this case. Three of the doctors treated Claimant. The three doctors who treated Claimant found that Claimant's injury as a result of the December 31, 2009 accident was confined to the right shoulder. None of the records have any notation of neck complaints from Claimant. The Court acknowledges that sometimes complaints are not always included in [a] doctor's records especially if that doctor is focused on treating just a specific part of the body. However it is difficult to believe that three doctors would fail to make a notation of neck complaints if Claimant voiced neck complaints to all three of them. It is simply not credible that Claimant has persistent complaints related to his neck that were not found by any of the treaters and were only noted by a doctor who saw him once. It is found and concluded that Claimant's injury as a result of the work accident of December 31, 2009 is confined to the right shoulder.⁴

The next issue before the Board is whether respondent should be given credit for an alleged preexisting functional impairment of the right shoulder that resulted from a 2001 high school wrestling injury. Respondent relies on Dr. Vosburgh's testimony that claimant had a preexisting impairment of between four and five percent. The Board finds that respondent failed to prove that claimant had a preexisting right shoulder functional impairment. If claimant had a preexisting right shoulder functional impairment, respondent failed to prove the nature and extent of the preexisting functional impairment. The Board also adopts ALJ Sanders' analysis on this issue:

Dr. Vosburgh who treated Claimant for his shoulder injury in 2001 and 2010 could only give any *[sic]* estimate of what Claimant's shoulder impairment could have been. However, he acknowledged that after ten years it is very difficult to make that determination. Dr. Vosburgh further acknowledged that Claimant did not have any limitations on his activities of daily living after the 2001 injury. In fact Claimant returned to competitive wrestling after the injury. It has simply not been established that Claimant had a preexisting impairment to his right shoulder as a result of the 2001 injury.⁵

In the Award, ALJ Sanders indicated that future medical treatment will be considered upon proper application. At oral argument, respondent asserted claimant failed

⁴ ALJ Award at 11.

⁵ *Id.*

to prove she was entitled to future medical treatment. This same issue arose in *Parker-Rouse*,⁶ where the Kansas Court of Appeals stated:

At the time of Amy's injury, the law stated that a claimant maintained a right to future medical benefits even when there was no evidence of a continuing need. See *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978); *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 983, 911 P.2d 198, rev. denied 260 Kan. 991 (1996).

Though K.S.A. 2011 Supp. 44-510h(e), enacted in 2011, predicates the right to claim future medical benefits upon a showing that "it is more probably true than not true that additional medical treatment will be necessary" after a claimant reaches maximum medical improvement, this 2011 legislative change is prospective rather than retroactive in application and does not apply to Amy's case. See *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336, 339, 995 P.2d 871 (2000).

K.S.A. 2008 Supp. 44-510k governs the process for obtaining future benefits. The statute permits both parties to present evidence regarding a disputed claim. The Board's decision entitles Amy to ask for future medical benefits, not to receive them. Larned retains the right to contest any claim for future medical benefits should such a claim be made. As the court noted in *Ferrell*, "since [the law] requires the claimant to prove the reasonableness of any future medical expenses, no hardship is worked upon the respondent." 223 Kan. at 423. We find no denial of due process in the Board's order regarding future medical benefits.

Relying on *Parker-Rouse*, the Board finds ALJ Sanders did not err by finding future medical treatment will be considered upon proper application.

CONCLUSION

1. Claimant's functional impairment is limited to the right upper extremity at the level of the shoulder.
2. Respondent failed to meet its burden of proof that claimant had a preexisting right shoulder functional impairment. Therefore, claimant sustained a 22% right upper extremity impairment at the level of the shoulder.
3. Because claimant's functional impairment is limited to the right upper extremity, the issue of the extent of claimant's work disability is moot.
4. Future medical treatment will be considered upon proper application.

⁶ *Parker-Rouse v. Larned Healthcare Center*, No. 107,221, 2012 WL 5392155 (Kansas Court of Appeals unpublished opinion filed Nov. 2, 2012).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 7, 2012, Award entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of June, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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⁷ K.S.A. 2012 Supp. 44-555c(k).